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Baker v. KAL, LLC Respondent's Brief Dckt. 44855

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARIAN B. BAKER, TRUSTEE OF THE
MARIAN B. BAKER TRUST, dated May
12, 2013,

Plaintiff/Respondent,

vs.

KAL, LLC, an Idaho Limited Liability
Company, et al.

Defendant/Counterclaimants/Crossclaimants/
Appellant,

and

JOSE I. MELENDRERAS and
JACQUELINE Z. DIAZ-MELENDRERAS,
husband and wife,

Defendants/Crossdefendant/Respondents.

SUPREME COURT NO. 44855

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District for of the State of Idaho, in and for
the County of Kootenai

Before the Honorable Lansing Haynes, District Judge Presiding

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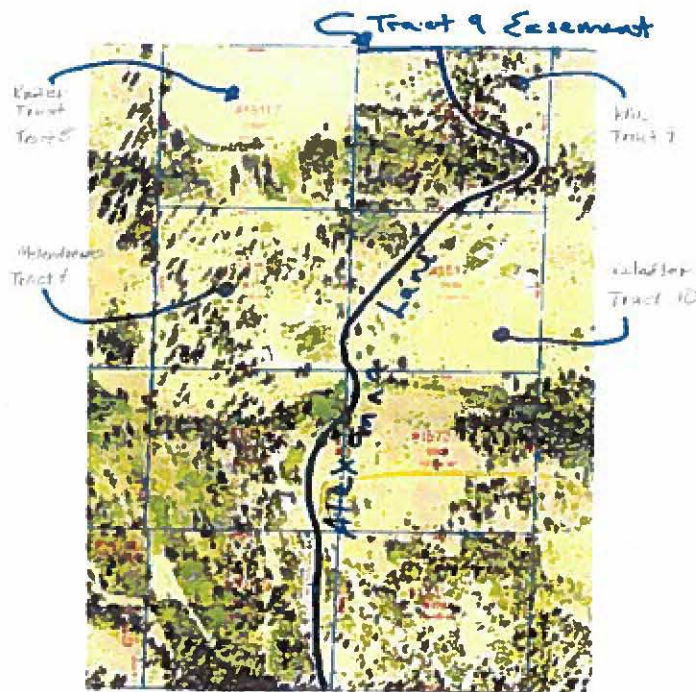
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I. STATEMENT OF THE CASE

This case arrives on appeal from the district court's grant of summary judgment in a non-jury civil action to plaintiff/respondent Marian B. Baker, Trustee of the Marian B. Baker Trust, dated May 12, 2013, ("Baker"), in a suit to quiet title relating to an access easement located over property owned by defendants KAL, LLC ("KAL"), John Stadler and Vicki Stadler, husband and wife ("Stadler"), and Jose I. Melendreras and Jacqueline Z. Diaz-Melendreras ("Melendreras"). Baker filed suit to quiet title following efforts by KAL and Stadler to preclude Baker from using a well-established roadway to access Baker's property. The image embedded below depicts the subject roadway and the various properties involved in this lawsuit:



Baker owns what is depicted as Tract 8 (the “Baker Property”); KAL owns what is depicted as Tract 9 (the “KAL Property”); Stadlers own what is depicted as Tract 10 (the “Stadler Property”); and at the time the suit was filed, Defendants Jose I. Melendreras and Jacqueline Z. Diaz-Melendreras (“Melendreras”) owned what is depicted as Tract 7 (the “Melendreras Property”).¹ The above-referenced recorded easements that provide access to the Baker Property are depicted above as “Alexanna Lane” and “Tract 9 Easement” (respectively, the “Alexanna Lane Easement” and the “Tract 9 Easement”).

The district court correctly ruled that Baker has a perpetual ingress, egress, and utilities easement to access Tract 8 through the Alexanna Lane Easement and the Tract 9 Easement. Following entry of the district court’s decision granting summary judgment to Baker, a document entitled Final Judgment was entered December 19, 2016. Subsequent to entry of the “Final Judgment,” an Amended Final Judgment was entered March 17, 2017. The Amended Final Judgment was entered to correct perceived deficiencies with the “Final Judgment” namely, to address the Counterclaims and Cross-Claims of the Defendants. No appeal was taken from the Amended Final Judgment.

II. STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

This case involves an access road commonly referred to as Alexanna Lane which road is and has historically been used to access Tract 8, the Baker parcel. The legal description of that road was included as Exhibit B to the Warranty Deed from Timber-Land-Ag, LLC (“Timberland”) to Melendreras, Baker’s predecessor in interest, Instrument No. 1576391,

¹ Melendreras no longer owns Tract 7 and is not participating as a party upon this appeal.

records of Kootenai County (the "Warranty Deed"). R., p. 119-126.² Prior to 1999, Timberland owned all parcels at issue in this matter, including but not limited to, Tracts 7, 8, 9, and 10.

On or about March 5, 2014, Baker purchased Tract 8 from Melendreras and took title pursuant to a Warranty Deed recorded March 5, 2014, in Kootenai County, as Instrument No. 2448258000. R., p. 27. As noted above, Baker's predecessor in interest, Melendreras, purchased Tract 8, along with Tract 7, and took title pursuant to the Warranty Deed from Timberland, recorded February 19, 1999. R., p. 128, ¶ 2; R., p. 135-138.

Defendant KAL, LLC, is the owner of Tract 9, a parcel of real property in Kootenai County pursuant to a Warranty Deed recorded April 4, 2002. R., p. 27. Defendant Stadler is the owner of Tract 10, a parcel of real property in Kootenai County pursuant to a Warranty Deed recorded January 9, 2003. R., p. 27.

In response to the Complaint to quiet title filed by Baker, KAL, the Stadlers, and Melendreras each filed an Answer, as well as affirmative Counterclaims and Cross-claims against Baker, and against each other. On June 17, 2015, Stadler filed Defendants John and Vickie Stadler's Answer, Defenses, Counterclaims and Crossclaims in Response to Plaintiff's Complaint. R., p. 26-31. Therein, the Stadlers asserted a counterclaim/cross claim to quiet title against Baker and Melendreras as Baker's predecessor in interest. *Id.* In addition, the Stadlers asserted a claim for trespass against Baker, as well as a separate claim for trespass against Melendreras. *Id.*

² Declaration of David E. Schumann.

On August 3, 2015, Melendreras filed an Answer to Counterclaim; Defenses; Cross-Claim wherein Melendreras concedes the existence of a valid easement to access Tract 8 (the Baker parcel) by and through Tract 10 (the Stadler parcel). R., p. 36-42.

On September 30, 2015, Baker filed its Motion for Summary Judgment, together with a brief in support, the Declaration of Stephen B. McCrea³, Declaration of David E. Schumann, and Affidavit of Jose I. Melendreras, requesting the district court rule, as a matter of law, that Baker enjoyed a perpetual a 60-foot wide easement (Alexanna Lane) for ingress, egress, and utilities to Tract 8 and that such easement was appurtenant to and legally described on Exhibit B of the Deed from Timberland to Melendreras, Instrument No. 1576391, records of Kootenai County, Idaho.⁴ In material part, Baker asserted that the Warranty Deed from Timberland to Melendreras, conveying both Parcel 1 (Tract 7 - Kootenai County Tax #18116) and Parcel 2 (Tract 8 - Kootenai County Tax #18117) contained express terms and Exhibits (A, B, and C), which reflected Timberland's intent to convey an easement to Melendreras so they could access Tract 8 through other parcels retained by Timberland, *i.e.*, Tracts 9 and 10. R., at p. 51-55. In particular, Exhibit A includes the grant of an easement for ingress and egress to Tract 8 along the north boundary of Tract 9 (Kootenai County Tax #18158). *Id.* Exhibit B ("Ingress, Egress and Utilities Easement") contains a legal description for the centerline of Alexanna Lane and is

³ A 2nd Declaration of Stephen B. McCrea was filed November 5, 2015, together with a substitute copy of Exhibit 5, pages 1&2, representing a correct copy of Instrument No. 1529118, records of Kootenai County, Idaho. R., p., 263-264, Exhibits at 265-266. A 3rd Declaration of Stephen B. McCrea was filed November 25, 2015, containing substitute copies of Exhibits 4, 5, 6, 7, 8, and 9 representing certified copies of the same. R., p. 267-268, Exhibits at p. 269-310.

⁴ R., p. 47-48 (Motion for Summary Judgment); p., 49-61 (Plaintiff's Brief in Support of Motion for Summary Judgment); p. 62-118 (Declaration of Stephen B. McCrea); p. 119-126 (Declaration of David E. Schumann); p. 127-141 (Affidavit of Jose I. Melendreras).

referenced and incorporated as an Exhibit to the Warranty Deed but is not specifically included as a grant or reservation. Exhibit C contains the legal description for the easement over the northern portion of Tract 9. Alexanna Lane does not otherwise touch Tract 8 *but for* the express grant of easement along the northerly boundary of Tract 9. *Id.* Thus, the Warranty Deed is ambiguous because even though the exact language of the Warranty Deed did not specifically grant an easement, it is clear that the easement described in Exhibit B (Alexanna Lane) was included or intended to be specifically included in the Warranty Deed since, without the ability to access Alexanna Lane, Melendreras and successor owners would not have the ability to exercise their right to access Tract 8 through the northern 60-feet of Tract 9. *Id.*

On October 15, 2015, KAL filed its Answer and Counterclaim, asserting that Baker's use of the easement across Tract 9 was wrongful and constituted a trespass. R., p. 142-145. On October 30, 2015, KAL filed its Memorandum in Opposition to Baker's Motion for Summary Judgment, together with an Affidavit of David White. R., p. 223-234, 235-240. Therein, KAL focused the vast majority of its briefing upon implied easement theories and, apart from passing reference, did not address the arguments or authority raised with respect to the motion for summary judgment upon the existence of an express easement. *See generally*, R., p. 223-234.

On June 13, 2016, Baker filed its Reply in Support of Plaintiff's Motion for Summary Judgment, together with an Objection to Motion to Strike the Second Affidavit of Jose I. Melendreras.⁵ R., p. 329-341, 321-328, and 318-320, respectively. By her Reply, Baker again

⁵ Pending a hearing on Baker's motion for summary judgment, this law firm appeared as additional counsel for Plaintiff and no substantive action was taken until May 23, 2016, at which time the Second Affidavit of Jose I. Melendreras was filed in anticipation of a hearing upon Baker's Motion for Summary Judgment. *See* R., p. 15

requested entry of judgment as a matter of law upon the theory of an express easement upon the ground that, while the Warranty Deed from Timberland to Melendreras was ambiguous, there was no genuine issue of material fact that Timberland intended to grant an easement to access Tract 8 through Tracts 7, 9, and 10.

Baker's Motion for Summary Judgment came on for hearing on June 20, 2016. During a subsequent hearing held June 29, 2016, the district court announced its decision upon Baker's motion for summary judgment, granting Baker's motion upon the theory of an express easement to access Tract 8. T. June 29, 2016.

In his decision, Judge Haynes determined (1) Timberland was the common owner of Tracts 5, 6, 7, 8, 9, 10, 11, and 12 and that Alexanna Lane crosses Lots 5, 6, 11, 10, 7, and 9; (2) Timberland used Alexanna Lane to access Tract 8; (3) in 1999, a warranty deed conveying property was executed from Timberland to Melendreras, conveying ownership of Tracts 7 and 8; (4) the Warranty Deed conveyed a 60-foot easement running from Tract 9 into Tract 8; and, (5) Melendreras sold Tract 8 to Baker in 2014, together with a deed and an easement to access Tract 8, the same easement access that is Alexanna Lane, that was the subject of the Warranty Deed from Timberland to Melendreras. *See generally*, T. June 29, 2016, pgs. 4-8. The district court further found that the Warranty Deed and attached Exhibit C was ambiguous and thus required the court to ascertain the intent of the grantor. *Id.* In making this determination, the district court

(Docket); R., p. 314-317. KAL moved the court to strike portions of the Melendreras affidavits by Motion dated June 6, 2016. R. p., 318-320. This Motion was granted in part and denied in part during the district court's pronouncement of his decision upon the motion for summary judgment. T. June 29, 2016. KAL included the district court's decision upon its Motion to Strike as a preliminary issue upon appeal but did not include any argument regarding the same in its opening brief in this matter. *See* R., p. 369 (Notice of Appeal); p. 374 (Amended Notice of Appeal).

concluded that based upon the record before it, there was no contrary evidence and therefore no genuine issue of material fact as to the intent of the Grantor, Timberland, to grant an easement to Melendreras to cross Tracts 5, 6, 11, 10, and 9, to access Tract 8. *Id.* The district court thus concluded that Baker enjoys an express easement by written instrument which easement was conveyed from Timberland to Melendreras and from Melendreras to Baker. *Id.*⁶

Following entry of the district court's order upon summary judgment, additional proceedings resulted in the entry of a document entitled Final Judgment on December 19, 2016.⁷ R., p. 358-366. Therein the Court entered Judgment in favor of Plaintiff, decreeing that Plaintiff possessed a valid perpetual ingress, egress, and utilities easement across the properties owned by Defendants. *Id.* The Court further entered Judgment in favor of Baker and against the Stadlers and KAL, dismissing the Counterclaims with prejudice. *Id.* On January 30, 2017, KAL filed an appeal from the document entitled Final Judgment. An Amended Notice of Appeal was filed by KAL on February 13, 2017.

On March 8, 2017, a Motion to Amend the Final Judgment Pursuant to Rule 60, I.R.C.P., was filed, which Motion was granted, followed by entry of an Amended Final Judgment on March 17, 2017. *See* R., p. 20 (Docket entry of March 8, 2017), R. p., 383-391. Pursuant to the

⁶ Upon all other theories of relief, namely, implied easement theories, the district court denied summary judgment, concluding the existence of genuine issues of material fact. In any event, however, adjudication of alternative theories for relief was unnecessary in light of the district court's conclusion that Baker had an express easement to access Tract 8. T. June 29, 2016, p. 8, l. 18 – p. 10, l. 12.

⁷ Baker's First Amended Complaint was filed July 20, 2017. Request for leave to file the First Amended Complaint was made prior to the hearing upon the motion for summary judgment on June 3, 2016. R., p. 15. Only Stadler filed an Answer to the First Amended Complaint. R., p. 16. The claims asserted pursuant to the First Amended Complaint were resolved by way of a Notice of Voluntary Dismissal of Counts Four and Five of the First Amended Complaint. *See* R., p. 17; Motion for Voluntary Dismissal of Count Six filed September 14, 2016, Order of Dismissal of Count Six, filed October 6, 2016. All counterclaims/cross claims were resolved subject to additional briefing and the Amended Final Judgment, entered March 17, 2017. R., p. 383-391.

Amended Final Judgment, the Court further decreed that Judgment was granted with respect to the Cross-claims at issue in this matter. The Amended Final Judgment fully adjudicated all claims at issue in this matter and constitutes the Final Judgment entered in this matter. KAL did not appeal from the Amended Final Judgment.

III. RESTATEMENT OF THE ISSUES

1. Whether the present appeal by KAL is procedurally defective and should be dismissed.
2. Whether the district court correctly held that Baker has an express easement for ingress and egress.
3. Whether Baker is entitled to an award of attorney fees on appeal pursuant to Idaho Code § 12-121.

IV. STANDARD OF REVIEW

An Idaho appellate court reviewing a ruling on summary judgment employs the same standard as the district court below. *Erland v. Nationwide Ins. Co.*, 136 Idaho 131, 133, 30 P.3d 286, 288 (2001). Under Idaho Rule of Civil Procedure 56(c), summary judgment is proper “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled a judgment as a matter of law.” I.R.C.P. 56(c). In order to demonstrate a genuine issue of material fact, the party opposing the motion must present more than a conclusory assertion that an issue of fact exists. *Allstate Ins. Co. v. Mocaby*, 133 Idaho 593, 596, 990 P.2d 1204, 1207 (1999). Instead, the party opposing summary judgment must respond to the motion with specific facts showing there is a general issue for trial. *Id.*; see also I.R.C.P. 56(e) (“[A]n adverse party may not rest

upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."). A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). Moreover, the existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *E.g., Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992).

In addition, as noted by the district court, this case was set for a court trial. "When an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." *Loomis v. Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991) (citing *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982); *Blackmon v. Zufelt*, 108 Idaho 469, 700 P.2d 91 (Ct.App.1985)).

In the present action neither party has claimed that any genuine issues of material fact exist with respect to the grant of summary judgment upon the theory of an express easement. Rather, KAL simply argues that the district court erred in its determination that the deeds at issue were "ambiguous." In addition, KAL argues that the district court erred in interpreting the intent of the parties when it created a new easement. Each of these arguments is without merit.

V. ARGUMENT

A. KAL did not timely appeal from the Amended Final Judgment entered in this matter.

Pursuant to its Amended Notice of Appeal, filed February 13, 2017, KAL appeals from the Final Judgment filed by the Clerk on December 19, 2016, entered in this action on or about December 14, 2016, the Honorable Lansing Haynes presiding. Therein, KAL asserts that the Final Judgment entered December 14, 2016 is an appealable order pursuant to Rule 11(a)(1), Idaho Appellate Rules. The document entitled “Final Judgment” entered by the district court on December 14, 2016, did not comply with Rule 54(a), I.R.C.P. Under that rule, “A judgment is final if either it is a partial judgment that has been certified as final pursuant to subsection (b)(1) of this rule or judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action.” I.R.C.P. 54(a) (emphasis added). The document entitled Final Judgment entered December 14, 2016 was not entered upon all claims for relief asserted by or against all parties in this action. R., p. 358-359; c.f., R., p. 383-384. An Amended Final Judgment was, however, entered on March 17, 2017, adjudicating all claims between all parties to this action, from which no appeal was taken by KAL. Rule 14, I.A.R., provides that “any appeal as a matter of right from the district court may be made only by physically filing a notice of appeal with the clerk of the district court within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment or order of the district court appealable as a matter of right in any civil or criminal action.” I.A.R. 14 (emphasis added). KAL did not appeal from the Amended Final Judgment entered March 17, 2017. As this Court has previously declared:

"[S]ubject matter jurisdiction is an issue that this Court may raise *sua sponte* at any time." *Johnson v. Blaine County*, 146 Idaho 916, 924, 204 P.3d 1127, 1135 (2009). This Court will, *sua sponte*, dismiss for lack of jurisdiction an appeal that is taken from a non-appealable order. *Highlands Dev. Corp. v. City of Boise*, 145 Idaho 958, 960, 188 P.3d 900, 902 (2008). "Although the document was entitled 'Judgment,' that is not controlling. 'Whether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title.'" *Harrison v. Certain Underwriters at Lloyd's, London*, 149 Idaho 201, 205, 233 P.3d 132, 136 (2010) (quoting *Camp v. East Fork Ditch Co., Ltd.*, 137 Idaho 850, 867, 55 P.3d 304, 321 (2002)).

Holland v. Metro. Prop. & Cas. Ins. Co. (In re Estate of Holland), 153 Idaho 94, 99, 279 P.3d 80, 85-86 (2012). KAL appealed from a non-appealable order and failed to remedy this defect following entry of an Amended Final Judgment. In addition, or in lieu of the substantive arguments raised below, the appeal should be dismissed for lack of subject matter jurisdiction.

B. The District Court Correctly Granted Summary Judgment Because There Was an Ambiguity in the Deed and Timberland Intended to Grant Melendreras an Express Easement in Alexanna Lane.

1. The District Court Properly Held that the Warranty Deed was Ambiguous.

The Appellant asserts that the District Court erred in holding that the Warranty Deed from Timberland to Melendreras is ambiguous. In the proceedings before the district court, the sole argument advanced by KAL with respect to Baker's motion for summary judgment upon the theory of an express easement was included in the section of KAL's Memorandum in Opposition to Baker's Motion for Summary Judgment in the section entitled "Statutory Easements Pass with Property." R, p. 228. Therein, KAL simply argues that "reserved" and "grant" "are neither ambiguous nor synonymous." R., p. 228. No additional authority or argument are advanced by

KAL with respect to the existence of an express easement. During oral argument, KAL argued only that the Warranty Deed from Timberland to Melendreras reserved access through Tract 7 and that the lack of a reservation of access through Tracts 9 and 10 was intentional. T. June 20, 2016, p. 54, ll. 4-25. With the exception of jurisdictional issues, "[a]n argument not raised below and not supported in the briefs is waived on appeal." *Minor Miracle Prods., LLC v. Starkey*, 152 Idaho 333, 336, 271 P.3d 1189, 1192 (2012) (citations omitted). In addition to a failure to provide clear context or support for Appellant's position in the proceedings before the district court, the argument presently advanced upon appeal is difficult to decipher and is itself ambiguous.

In interpreting and construing deeds of conveyance, the primary goal is to seek and give effect to the real intention of the parties. *Benninger v. Derifield*, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (citing *Neider v. Shaw*, 65 P.3d 525 (2003); *C&G, Inc. v. Rule*, 135 Idaho 763, 25 P.3d 76 (2001)). "In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the instrument." *C&G Inc.*, 135 Idaho at 765, 25 P.3d at 78 (citing *Juker v. American Livestock Ins. Co.*, 102 Idaho 644, 645, 637 P.2d 792, 793 (1981)). Conversely, when a Court finds a document to be ambiguous, the Court may consider parol evidence to discover the drafter's intent. *Porter v. Bassett*, 146 Idaho 399, 404-05, 195 P.3d 1212, 1217-18 (2008).

The district court in this case properly applied Idaho law decreeing that "[u]ncertainties should be treated as ambiguities; such ambiguities are subject to be cleared up by resort to the intention of the parties as gathered from the deed, from the circumstances attending and leading

up to its execution, from the subject matter, and from the situation of the parties at the time.” *Benninger v. Derifield*, 142 Idaho at 489, 129 P.3d at 1238 (citing *City of Kellogg v. Mission Mountain Interests*, 135 Idaho 239, 16 P.3d 915 (2000)). The district court correctly perceived that the use of “reserved” was not dispositive but instead created an uncertainty, given the other circumstances surrounding the conveyance of easements appurtenant to Tract 8.

An easement may be created by way of exception or by reservation. . . . No particular forms or words of art are necessary; it is necessary only that the parties make clear their intention to establish a servitude. Regardless of the terms used, courts generally will attempt to ascertain the intention of the parties by referring not only to the language of the deed, but also to the circumstances attending the transaction and the condition of the property.

Benninger v. Derifield, 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (citing *Seccombe v. Weeks*, 115 Idaho 433, 436, 767 P.2d 276, 279 (Ct. App. 1989), disapproved of on other grounds, *Rodriguez v. Oakley Valley Stone, Inc.*, 120 Idaho 370, 378, 816 P.2d 326, 334 (1991)).

The Timberland Warranty Deed expressly conveys:

1. a grant to Melendreras in real property described on “EXHIBIT A” together with their appurtenances.
2. a grant that is subject to existing easements and right of ways.

R., p. 77.

However, the Warranty Deed is not a model of clarity. In reviewing the four corners of the Warranty Deed, including Exhibit A, *together with* other Exhibits referenced in Exhibit A, Exhibits B (the Alexanna Lane legal description) and Exhibit C (the easement over the northly

portion of Tract 9), the district court correctly perceived that the Warranty Deed was ambiguous. For example, pursuant to Exhibit A, Timberland seems to reserve a portion of Alexanna Lane as it relates to Parcel 1 (Tract 7), but then describes the reservation of the entire Lane under Exhibit B, not just the portion within Tract 7:

RESERVING THEREFROM, that portion of the above described parcel which is described in an Ingress, Egress and Utilities Easement as more fully described on in Exhibit "B" attached hereto and incorporated herein in.

R., p. 78.

The language of the deed is ambiguous because it "reserves" an easement across its own property, *i.e.*, the entire Alexanna Lane, including the portions that run through Tract 7. In other words, Exhibit B does not just describe the portion of the reservation in only Tract 7, but it describes a reservation covering the entire portion of Alexanna Lane, including those lands owned and retained by Timberland post-closing of the Melendreras deal. As the district court correctly held, Timberland could not possibly reserve an easement for itself on property it owns. T. June 29, 2016, p.7 ll. 11-25. Further, the inclusion of a reservation is not necessary as the Warranty Deed specifically provides that the grant is "subject to all existing... easements, right of way..." which clearly would have included Alexanna Lane in any event. R., p. 77. As such, the district court properly found the word "reserving" to be an ambiguous phrase in the context of the entire deed. T. June 29, 2016 p. 13 ll. 19-25.

Additionally, the Warranty Deed is unclear on its face because Timberland makes a vague and failed attempt to grant Melendreras an express easement to gain access to Parcel 2

(Tract 8) through Timberland's Tract 9. Expanding, pursuant to the Warranty Deed, Timberland grants Melendreras an access easement to traverse over the north 60 feet of Tract 9 providing Melendreras and successor owners access to Parcel 2 (Tract 8). R., p. 78. However, Timberland failed to grant specific access in Alexanna Lane to the owners of Parcel 2 (Tract 8) in order to allow them to connect to the 60-foot easement in order to gain access to Parcel 2 (Tract 8). The express right of access granted to Melendreras to traverse over the north 60 feet of Tract 9 to access Parcel 2 (Tract 8) in the Warranty Deed is meaningless if it does not also include an express right to use Alexanna Lane. In short, the Warranty Deed is ambiguous because Timberland grants Melendreras a right to access Parcel 2 (Tract 8) without granting the legal ability to exercise that right.

The district court thus correctly observed that the Warranty Deed's grant of access over a portion of Tract 9, coupled with Timberland's reference of Alexanna Lane in improperly reserving (not granting) access, creates an ambiguity as to how and when to apply the express terms contained in the document and reconcile inconsistent terms. As the district court fittingly noted, an absurd result occurs when applying the literal definition of "reserving" in light of Timberland's grant of access over Lot 9 under the Warranty Deed. T. June 29, 2016 p. 13 ll. 19-24. Therefore, the district court's ruling that the inconsistent language created an ambiguity in the Warranty Deed was proper.

2. The District Court Properly Held that Timberland Intended to Grant the Melendreras an Access Easement to Lot 8.

When a Court finds a document to be ambiguous, the Court may consider parol evidence to discover the drafter's intent. *Porter v. Bassett*, 146 Idaho 399, 404-05, 195 P.3d 1212, 1217-18 (2008). Parol evidence may be considered to aid a trial court in determining the intent of the drafter of a document if an ambiguity exists. *Hall v. Hall*, 116 Idaho 483, 484, 777 P.2d 255, 256 (1989). Parol evidence may also be considered in a situation where a latent ambiguity might not appear upon the face of the contract, but lies hidden in the subject to which it has reference. *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20, 245 P.2d 1045, 1049 (1952).

After finding the Warranty Deed to be ambiguous, the district court properly held, that based on the record, and in light of the absence of contrary evidence, it was Timberland's intention to grant Melendreras an express easement to cross Tracts 5, 6, 11, 10 and 9 so they could legally access Tract 8 and to reserve to itself an easement to cross Tracts 7 and 8. T. June 29, 2016 p. 8 ll. 1-9. The district court's finding was proper because the record firmly establishes Timberland's intent to grant an express easement. Such evidence includes the following undisputed facts contained in the affidavits of Mr. Melendreras which give meaning to the granting language:

1. At the time of the Melendreras Purchase, the Easements were being used, obviously and permanently, by Timberland to access the Baker Property. R., p. 128.
2. At the time of the Melendreras Purchase, the Easements were reasonably necessary for the practical use and enjoyment of the Baker Property. R., p. 128.
3. Prior to purchasing the parcels in February 1999, Melendreras, in the presence of the seller, Vernon Jerry Mortenson, a principal of Timberland, physically examined both parcels using Alexanna lane. R., p. 128, ¶ 2.

4. As part of obtaining the loan to purchase the Baker Property, the Melendrerases were required to secure access to the same by a grant of the Easements from Timberland. R., p. 315, ¶ 4.⁸
5. Prior to the close of the Melendreras Purchase, Mr. Melendreras witnessed a surveyor stake out the Easements and place survey pins along the Easements' boundaries. R., p. 315, ¶ 5.
6. The description of the Easements was included in the Warranty Deed from Timberland to the Melendrerases. *See e.g.*, R., p. 119-126.
7. The pins staked by the surveyor in 1999 marking the Easements are still in place today and conform to the location of the Easements. R., p. 315.

These facts were uncontroverted. As the district court duly noted, KAL purchased Tract 9 in 2002 and the Stadlers purchased Tract 10 in 2006. T. June 29, 2016, at p. 5, ll. 13-15, p. 8, ll. 13-17. The district court's conclusion that there was no genuine issue of material fact regarding the intent of the grantor, Timberland, is not challenged by any citation to contrary evidence in the record before this Court.

The fact that Timberland granted Melendreras an easement to access Parcel 2 (Tract 8) over and across the top portion of Tract 9 in the Warranty Deed is additional evidence that Timberland clearly intended that Melendreras and their successor owners would have unfettered and complete access to the northern portion of Tract 9 through Alexanna Lane to access Tract 8.

The district court's grant of summary judgment should be upheld because the district court was correct in holding that the Warranty Deed was ambiguous and the record conclusively

⁸ The district court did grant KAL's Motion to Strike Mr. Melendreras' testimony as to statements made by Mr. Mortensen. T. June 29, 2016, p. The district court's decision, does not however, materially impact the balance of Mr. Melendreras' statements relied upon herein or the lack of evidence of a contrary intent by Mortensen/Timberland.

establishes, and is devoid of evidence to the contrary, that Timberland intended to grant Melendreras and successor interest holders of Tract 8 an express easement to cross Tracts 5, 6, 11, 10 and 9 in order to access Tract 8.

C. Baker is Entitled to an Award of Attorney Fees and Costs on Appeal Pursuant to Idaho Code § 12-121 and Rules 40 and 41, I.A.R..

Pursuant to Idaho Code § 12-121, the court “may award reasonable attorney's fees to the prevailing party or parties when the [court] finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation.” “Such circumstances exist when an appellant has only asked the appellate court to second-guess the trial court by reweighing the evidence or has failed to show that the trial court incorrectly applied well-established law.” *Fuquay v. Low*, No. 44155, 2017 Ida. LEXIS 197, at *14-16 (June 29, 2017) (citing *City of Boise v. Ada Cnty.*, 147 Idaho 794, 812, 215 P.3d 514, 532 (2009)). “Ordinarily, attorney fees will not be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented.” (*Id.* (quoting *Nelson v. Nelson*, 144 Idaho 710, 718, 170 P.3d 375, 383 (2007))).

KAL failed to appeal from the Amended Final Judgment which judgment was the only document to dispose of all of the parties’ claims. I.R.C.P. 54. The failure to appeal from a final judgment renders all further argument by KAL frivolous, unreasonable, and without foundation. In addition, turning to the substance of KAL’s argument, KAL has failed to raise any new or compelling argument to call into question the validity of the district court’s initial order granting summary judgment to Baker. “[A]ttorney fees on appeal have been awarded under Section 12-121 when appellants failed to add any new analysis or authority to the issues raised below that were

resolved by a district court's well-reasoned authority." *Fuquay*, 2017 Ida. LEXIS 197, at *15 (June 29, 2017) (quoting *Frantz v. Hawley Troxell Ennis & Hawley LLP*, 161 Idaho 60, 66, 383 P.3d 1230, 1236 (2016) (internal quotation omitted)).

KAL's opening brief on appeal re-argues and expands KAL's assertion in its Memorandum in Opposition to Baker's Motion for Summary Judgment that "reserved" and "grant" "are neither ambiguous nor synonymous." R., p. 228. To the extent not previously waived by a lack of cogent argument or authority, the pursuit of this appeal remains without factual or legal support. KAL provides no cogent authority or analysis to support its current claim that the district court erred in its determination of an ambiguity or in its application of the record to ascertain the intent of the parties. Thus, Baker is entitled to attorney fees on appeal pursuant to Idaho Code § 12-121 and Rule 41, I.A.R.. Baker is also entitled to an award of costs on appeal pursuant to Rule 40, I.A.R.

VI. CONCLUSION

For the above reasons, Baker respectfully requests that the Court uphold the decision of the district court granting summary judgment in Baker's favor. Baker further requests that the Court grant Baker an award of attorney fees and costs on appeal pursuant to Idaho Code § 12-121 and Rules 40 and 41, I.A.R.

DATED this 16th day of August, 2017

Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.

By: 
ERIKA P. JUDD

CERTIFICATE OF SERVICE

The undersigned certifies that on the 16th day of August, 2017, she caused two (2) true and correct copies of the foregoing to be forwarded by the method(s) indicated below, to the following:

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email addresses:

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